Supreme Court, U.S.
FILED

No. 01 264 JUN 28 2001

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

Jerry Gribcheck,
Petitioner,

-vs-

Marvin T. Runyon, Jr.,
Postmaster General,
United States Postal Service,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER DURING REVIEW OF A MOTION FOR SUMMARY JUDGMENT IN A REHABILITATION ACT OR OTHER CASE USING THE *MCDONNELL DOUGLAS* BURDEN SHIFTING SCHEME THE PETITIONER MAY REST ON HIS *PRIMA FACIE* CASE WITHOUT PRODUCING ADDITIONAL EVIDENCE TO REBUT THE RESPONDENT EMPLOYER'S "LEGITIMATE EXPLANATION" FOR TAKING ADVERSE EMPLOYMENT ACTION WHEN IT IS APPARENT FROM THE RECORD THAT THE EMPLOYER'S TESTIMONY SHOWS THERE IS A GENUINE DISPUTE AS TO THE CREDIBILITY OF ITS PROFFERED REASONS WITHOUT FURTHER ANALYSIS.

LIST OF PARTIES

The Party Plaintiff-Petitioner is Mr. Jerry Gribcheck of 18740 Riverview Rd., Chagrin Falls, Ohio 44023. Michael Terrence Conway, Esq. Ohio Supreme Court I.D. No. 0058413, proprietor of Michael Terrence Conway and Co., 180 Aster Place, Brunswick, Ohio 44212, (330) 220-7660 is Counsel for Petitioner. Mr. Conway is a member of the bar of the U.S. Supreme Court as of 28 February 2000.

The Party Defendant-Respondent is the Postmaster General of the United States, Marvin T. Runyon, Jr., represented by the Attorney General of the United States, Department of Justice, Washington D.C. 20530 and care of the office of the United States Attorney, 1800 Bank One Center, 600 Superior Street-East, Cleveland, Ohio, 44114, (216) 622-3600.

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The opinion of the United States Court of Appeals for the Sixth Circuit was reported in *Jerry Gribcheck v. Marvin T. Runyon, Jr.*, No. 00-3279, March 30, 2001, 2001 FED App. 0091P (6th Cir) File name: 01a0091p.06. A copy of this opinion is appended at Appendix "A." A copy of the District Court opinion disposing of this case on summary judgment is appended at Appendix "B."

STATEMENT OF JURISDICTION

Jurisdiction for consideration of this petition is proper pursuant to 28 U.S.C. Sec. 1254 "Courts of appeals; certiorari; certified questions" which states in part "(c)ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree..." Moreover, U.S. Supreme Court Rule 13.1 states in part that "a petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States Court of Appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of judgment." The instant case was decided and filed on March 30, 2001. This petition has been filed within 90 days of that date or by leave pursuant to motion to extend time for filing. Moreover, pursuant to U.S. Supreme Court Rule 10.1 (c) certiorari is properly granted when "a United States court of appeals has decided and important question of federal law which has not

been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case addresses the proper interpretation and employment of Federal Rehabilitation Act, 29 U.S.C. Section 794 *et seq*. and Federal Rule of Civil Procedure No. 56 (c).

Due to the length of these statutory provisions, their respective text is printed in Appendix "C" and "D."

STATEMENT OF THE CASE

Petitioner Plaintiff-Appellant Jerry Gribcheck is a postal worker who brought suit seeking compensation for illegal retaliation committed by his supervisors in violation of the Federal Rehabilitation Act, 28 U.S.C. Section 794 during his employment with the Defendant U.S. Postal Service in the U.S. District Court, Northern District of Ohio, Eastern Division on 2 OCT 1997. Jurisdiction in the District Court was proper under the Act and after the Equal Employment Opportunity Commission issued Petitioner a "right to sue" letter. Gribcheck complained that he was suspended for 14 days from work after he was wrongfully accused of profanely berating (yelling to a fellow employee in a factory environment "the __ machine is broke") and assaulting a fellow employee named Tracy Williams with a conveyor belt table (a physically impossible feat due to its size and weight) and after he had sued the Respondent Postal Service in a prior Rehabilitation Act claim which was pending at the time of the employer's adverse action.

Respondent-Defendant filed a motion for summary judgment pursuant to Federal Civil Rule 56 (C). On 28 JAN 2000 the District Court granted the Defendant-Appellee's Motion finding that Petitioner had not offered sufficient evidence in

response to prove a *prima facie* retaliation case in that he did not show a causal connection between adverse discipline in the Williams incident and his engagement in prior EEOC activity. Moreover, the District Court concluded, after improperly weighing witness credibility, that Gribcheck could not prove the Defendant employer's explanation for adverse discipline was a pretext under the *McDonnell Douglass* paradigm. For example, the District Court concluded that Williams "had no motive to lie or to fabricate a tale" in making complaints about the Petitioner. The District Court further held Petitioner could not prove pretext by merely "making a blanket denial that the 12 FEB 1997 incident occurred." (Appendix "B" at 32).

However, the record shows Gribcheck did no such thing. What the Petitioner showed in opposition to summary judgment is that the USPS story regarding Williams and an alleged corroborating witnesses observations were not credible due to its many inconsistencies and thus raised an issue of fact for trial. (Appendix "E"). Plaintiff-Appellant appealed the adverse district court judgment on 24 FEB 2000.

Upon review by the United States Court of Appeals for the Sixth Circuit, it was determined that the Appellant proved a *prima facie* case for retaliation and that the District Court was in error to have concluded otherwise. (Appendix A at 24). However, like the District Court, the Sixth Circuit found that the Appellant had not produced credible evidence that showed the Defendant employer's reason for adverse action was a pretext for retaliation. (Appendix A at 26). Yet the Sixth Circuit reached its conclusions the same way it forbid the U.S. District Court from doing so, by weighing the credibility of the parties and witnesses in the case. (Appendix "A" at 26-27).

For example, the Sixth Circuit held "Gribcheck attempts to refute the Postal Service's stated reasons by struggling to point out inconsistencies in the various statements given by Postal Service employees...This is not evidence, nor does it case doubt on Williams story..." (*Id.*). Moreover, Petitioner noted below that one complaining supervisor who initiated discipline against

the Petitioner in the Williams incident, Sam Brucchieri, denied he was not aware of Gribchek's prior EEOC activity when in fact he was deposed as a witness in the prior Rehabilitation Act case, and thus accused him on brief of being a "bald faced liar." The Sixth Circuit held in response that "Gribcheck asserts that Brucchieri is a "bald faced liar" and questions the credibility of Kirkman. This is not the sort of "evidence" contemplated by the third step of *McDonnell Douglas*." (Appendix "A" at 27).

In making its finding, the Sixth Circuit ignored the context of the Petitioner's argument as deduced from Petitioner's Appellate Brief (Appendix "E" at 41): "Defendant-Appellee argued on Motion that "(f)irst, Gribcheck cannot show that the officials who caused his discipline for the behavior that he displayed on February 12, 1997 were sufficiently aware of his previous EEO activity to be charged with knowledge." (Def. Mot. S/J at 6, R. 21, JA 55). In response, Appellant argued (Brf. in Opp. S/J at 2; JA 151): "REPLY: This claim is false. USPS agent Brucchieri claimed, according to the Defendant that "he had no idea what type of lawsuits Gribcheck files since Gribcheck filed so many things." (Motion S/J at 6). "He further testified that he did not get involved in EEO matters and that he really did not know what these cases were all about." (Motion S/J at 6). Brucchieri is a bald faced liar. Brucchieri was an adverse witness for Gribcheck in Case No. 1: 96 CV 0012, *Gribcheck v. Marvin T. Runyon* which was filed in this same Court with this same judge and he was accused of discrimination by the Plaintiff after the filing of an EEOC charge against the USPS in 1995. A copy of his deposition from that case is attached as Exhibit 2. *See, also*, Exhibit 4 which shows Brucchieri was a witness in a prior Title VII case had with the Plaintiff in this Court."

Moreover, Petitioner pointed out below that it was supervisor Kirkman who authorized the 14 day suspension of Gribcheck but who also expressly admitted in deposition after deciding to discipline the Petitioner he did not know if Williams story was true or false." In addition, Kirkman was a witness in Case No. 1: 96 CV 0012, *Gribcheck v. Marvin T. Runyon* as was

Bruchierri and signed off as a USPS settlement representative on an EEOC settlement agreement with the Petitioner entered on Jane 19, 1997, and immediately prior to Williams incident. Petitioner then made the sum total argument that he could show he was disciplined for pretextual reasons in the Williams incident because even the Respondent's managers admitted they could not decide if Gribcheck engaged in the very conduct alleged as their reason for justifying his 14 days suspension. (Appendix "E" at 43).

The dismissal of Petitioners' case was affirmed by the Sixth Circuit on 30 MARCH 2001 and he timely sought certiorari from this Court by way of petition in response.

ARGUMENT IN FAVOR OF ISSUANCE OF WRIT

Summary of Argument

In Rehabilitation Act, as well as Title VII and ADA cases using the *McDonnell Douglass* burden shifting framework, the Defendant-employer will often claim that the Plaintiff-employee must be able to prove beyond offering evidence in support of the *prima facie* case that the employer's explanation for adverse discipline action taken against him was a pretext for discrimination and in order to survive a summary judgment challenge.

This Court implied in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) that the in effect "pretext plus", i.e. showing the employer's stated reason are actually false, Fed. Rule 56 challenge practiced in various lower circuits was no longer to be used in deciding the outcome of dispositive motions (Rule 56 or Rule 50), but then in some confusion further stated that the Petitioner must produce evidence in addition to the prima *facie case* to defeat a dispositive motion. *Reeves* dealt with a motion for a directed verdict and thus was not expressly relied upon by the lower court

in dismissing Petitioner's case, yet it is the latest controlling case on the subject of *McDonnell Douglas* burden shifting scheme and is thus implicated as being dispositive of this petition. It appears *Reeves* was meant to clarify the procedure used under the *McDonnell Douglass* burden shifting scheme discussed in *Burdine* and make it easier to get a discrimination case to the jury; yet its internal inconsistencies leave unsettled issues to be further addressed and determined by this Court so as to dispose of the instant case and others like it.

For example, in many cases, such as the case *sub judice*, the proof offered to support the *prima facie* case is also the sole and best evidence of employer pretext because more often than not, discrimination cases turn on the issue of employer credibility as this Court held in *Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983). In spite of this, in *Reeves* this Court held "a plaintiff's *prima facie* case, *combined* with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." (emphasis added).

Now due to this "combined with sufficient evidence" requirement, the Sixth Circuit and many other courts refuse to subscribe to the principal that a Plaintiff-employee may rest on his *prima facie* discrimination or retaliation case even if that evidence is also wholly adequate to rebut the employer's "legitimate explanation" for engaging in adverse action such as discipline or employment termination. *Reeves* implicitly indicates that the *prima facie* case itself is never enough evidence to defeat employer pretext and that something needs to be "combined" with it to get to the jury, even if no other better evidence exists. Given its rich history in discrimination case law, this Court's decision starting with *Diebold*, that on summary judgment motion the district court is not permitted to weigh evidence or the testimony of witnesses, but only to decide whether a genuine dispute exists for resolution at jury trial based upon the evidence presented; this result cannot be the meant intention of this Court. Never-the-less *Reeves* and *Burdine* unfortunately are relied upon by all of the federal circuits

including that in the case *sub judice* to unfairly dispose of otherwise meritorious cases. Indeed, *Reeves* and *Burdine* did not address the dilemma where the best evidence of pretext, that is, that lack of credibility on the part of the employer, is in fact the Plaintiff's *prima facie* case.

It follows that the writ sought by the Petitioner should be granted so that this Honorable Court can determine whether or not the Petitioner can rest on his *prima facie* case in a Rule 56 contest when the evidence presented there is also adequate to rebut the Defendant's claim of legitimacy in making adverse employment decisions in Rehabilitation Act, Title VII and ADA and other cases where the *McDonnell Douglas* burden shifting scheme is employed. The Petitioner below should not have had to offer additional evidence of pretext to defeat Respondent's summary judgment motion where the employer admits its proffered "legitimate explanation" justifying the taking of adverse employment action against him is not reliable or even believed by the person making the decision to discipline or terminate the Petitioner. To go the other way and deny this petition is to permit the Respondent and other employer's to have a license to thwart the Petitioner's retaliation or discrimination case by merely making wild claims in rebuttal that cannot be verified by either party when confronted with a *prima facie* case. Granting the writ here will have obvious immediate impact on Petitioner's case making it eligible for reversal and remand, and will favorably affect all federal circuits since it will clarify a confused area of federal motion practice that has without doubt, unfairly favored employers in discrimination and retaliation cases over time, contrary to the intent of Congress in passing anti-discrimination legislation.

Detailed Argument

The *Reeves* and *Burdine* Cases Should Be Deemed to Stand for the Proposition that a Plaintiff who Proves Under the *McDonnell Douglas* Framework that the Employer's "Legitimate Explanation" Offered In Response to the *Prima Facie* Case is Not Worthy of Credence Due to The Untrustworthy Circumstances of its Making Does Not Have to Produce Additional Evidence Of Pretext Beyond the *Prima Facie* Case To Survive A Motion for Summary Judgment

Reeves dealt with an age discrimination case that was submitted to the jury and resulted in a plaintiff's verdict over the Defendant's Rule 50 motion. On appeal the case was reversed by the 5th Circuit finding that the evidence submitted to the jury attacked only the Defendant's credibility and was insufficient as a matter of law to prove discrimination. This Court on grant of writ of certiorari reversed the 5th Circuit noting "(i)t suffices to say that, because a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability [for discrimination], the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination."

In arriving at its conclusion, the Court held under the *McDonnell Douglas* burden shifting scheme citing *inter alia*, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981) "(a)lthough intermediate evidentiary burdens shift back and forth... "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253. And in attempting to satisfy this burden, the plaintiff--once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision--must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." ... That is, the plaintiff may attempt to establish that he was the victim of

intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, ...the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case "and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual." *Id.* at 255, n. 10.

Reeves and *Burdine* are thus taken to indicate that once the Plaintiff establishes a *prima facie* discrimination or retaliation case and it is challenged with employer's "legitimate explanation" then the *prima facie* case may be of no practical legal consequence simply due to the fact that the employer denied the truth of the Petitioner's claims with a "legitimate explanation." The deck is then tilted in favor of the employer who has now converted the *prima facie* case into a virtual mockery of a "he said-she said" dispute. It is at this point under *Reeves* and *Burdine* that the Petitioner must add evidence to his *prima facie* case to get the case to the jury in spite of the fact that the Respondent employer may not be able to overcome the inference of discrimination with its "legitimate explanation" due to, for example, its own lack of credence.

For example, in the case *sub judice*, the employer Postal Service defeated Petitioner Gribcheck's case on summary judgment motion after claiming for its "legitimate explanation" Petitioner was disciplined with a 14 day suspension for assaulting fellow employee Tracy Williams, but after the disciplining USPS manager Charlie Kirkman admitted in deposition that he did not know whether or not the Petitioner acted violently or otherwise as charged by the complaining employee. In arriving at its conclusions in favor of the Postal Service, the Court determined that Petitioner' story was not as credible as the Respondent's because he had not shown Respondent's story was not as believable as claimed. For example, the Court held: "Gribcheck attempts to refute the Postal Service's stated reasons by struggling to point out inconsistencies in the various statements

given by Postal Service employees...This is not evidence, nor does it case doubt on Williams story..." (Appendix "A" at 26).

Yet if the Petitioner cannot prove his retaliation case by an attack against the credibility of the Respondent's "legitimate explanation", it will be a rare occasion indeed when there is something more he can do. Indeed, this Court set up the *McDonnell Douglass* burden shifting scheme in the first place because "the question facing triers of fact in discrimination cases is both sensitive and difficult," and "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). One must ask then why Gribcheck was disciplined at all if the employer via Supervisor Kirkman admits it did not believe in the veracity of its own "legitimate explanation." Under the Court's *Burdine* and *Reeves* standard for disposition of cases on motion, the Petitioner is left without a fair chance to prove his case even the Respondent admits it can not back up its own disciplinary action as not being retaliatory as defined under the Rehabilitation Act. Such a result cannot be what was intended by the drafters of Federal Civil Rule 56 (C) or the intent of Congress in passing the Rehabilitation Act.

Indeed, pursuant to 29 USC Section 794 (a),"No otherwise qualified individual with handicaps in the United States as defined in 29 U.S.C. Section 706 (8) shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service." Proof of retaliation under the Rehabilitation Act exists when there is a causal connection between Petitioner's making a claim under the Rehabilitation Act and a following adverse employment action. *See, e.g., Sherman v. Runyon*, 235 F.3d 406 (8th Cir. 2000) *and compare with Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987). Accordingly, an evaluation of the credibility of the employer is the linchpin in deciding retaliation cases, and so there is no reason to require Petitioner to produce additional evidence

showing pretext under the *McDonnell Douglass* test, which may be modified as the circumstances warrant, when the employer casts doubt on the veracity of its own "legitimate explanation" during the process of making the same in a deposition as with Mr. Kirkman in the case *sub judice*.

Yet in spite of this the Sixth Circuit held citing *inter alia*, *Burdine*, that the Appellant-Petitioner must yet come forward with additional evidence of employer retaliatory conduct to get the case to the jury, claimed he did not, and upheld dismissal of the case even though it agreed he was able to demonstrate all the elements of a *prima facie* retaliation/discrimination case. (Appendix "A" at 24-25). Petitioner asks, again, what more could he have been expected to show to the Sixth Circuit to prove the Respondent was acting out of retaliation towards him when it admitted it did not necessarily believe its own "legitimate explanation" but disciplined him anyway, and after being involved in extensive Rehabilitation Act and EEOC litigation with the Petitioner at the same time?

Under *Reeves* and *Burdine*, the Sixth Circuit's opinion in Gribcheck could be allowed to stand but the result would be simply unfair and unjust. Indeed, in the *Reeves* decision this Court agreed "Petitioner ... made a substantial showing that respondent's explanation was false" and that "(p)roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. ... In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." However, in spite of this, the *Reeves* Court concluded: "It suffices to say that, because a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." (emphasis added).

The net result of the high court's language is that to defeat a motion for summary judgment or a Rule 50 motion for directed verdict using the same dispositive test in either case, the Petitioner must add "sufficient evidence" to the *prima facie* case regardless of the independent persuasive strength of the same.

In the interest of justice, fairness and uniformity of the interpretation of the rules, this Court should now take the opportunity this case presents to clarify or add to *Reeves* and *Burdine* by finding that a *prima facie* discrimination or retaliation case is under some circumstances evidence that the "legitimate explanation" offered by the employer is itself evidence of a pretext for discrimination, such as that presented in Petitioner Gribcheck's case where an employer casts doubt on the credibility of its proffered explanation for adverse action with its own independent testimony. In addition, for obvious reasons, this Court should find that neither the District Court nor the Appellate Court can weigh evidence of witness and party credibility in making its determinations here as is tacitly permitted under the current *Reeves* and *Burdine* standard which permits a court to test the "sufficiency of the evidence" on motion.

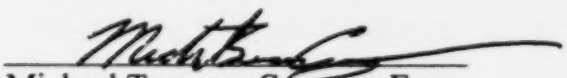
CONCLUSION AND PRAYER

The lower court's decision in this case required the Petitioner to produce evidence in addition to his *prima facie* Rehabilitation Act retaliation/discrimination case to defeat a summary judgment motion even though the Respondent's "legitimate explanation" was discredited by its own author during his deposition. In spite of this, the Respondent's summary judgment motion was granted and that decision was upheld on appeal. Under *Reeves* and *Burdine* this unfair decision would be left to stand as precedent. Accordingly, as this Court is one of justice and fair play, *Burdine* and *Reeves* should be modified or clarified to permit a Plaintiff to rest on his *prima facie* retaliation or discrimination case brought under the *McDonnell Douglass* framework in opposition to a dispositive defense motion when the *prima facie* case is the most compelling evidence itself of unlawful conduct, --and when measured against

the Defendant's "legitimate explanation" for taking adverse employment action. The Petition for writ of Certiorari should be granted in the interests of justice and fair play and for the benefit of all litigants in the federal court system. Petitioner ultimately seeks the opportunity to have his retaliation case heard by a jury on remand and will further seek this remedy if the writ is granted.

Respectfully Submitted,

/s/ Michael Terrence Conway, Esq.



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APPENDIX "A"

Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2001 FED App. 0091P (6th Cir.)

File Name: 01a0091p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Jerry Gribcheck, Plaintiff-Appellant, No. 00-3279

v.

Marvin T. Runyon, Jr. Postmaster General, United States Postal Service, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 97-02547--Lesley Brooks Wells, District Judge.

Argued: March 6, 2001

Decided and Filed: March 30, 2001

Before: MARTIN, Chief Judge; BATCHELDER and MOORE, Circuit Judges.

COUNSEL

ARGUED: Michael T. Conway, MICHAEL TERRENCE CONWAY COMPANY, Brunswick, Ohio, for Appellant. Annette G. Butler, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee. **ON BRIEF:**

Michael T. Conway, MICHAEL TERRENCE CONWAY COMPANY, Brunswick, Ohio, for Appellant. Annette G. Butler, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

OPINION

BOYCE F. MARTIN, JR., Chief Judge. Jerry Gribcheck appeals the district court's grant of summary judgment to the U.S. Postal Service on his retaliation claim filed under the Rehabilitation Act, 29 U.S.C. § 794. For the following reasons, we AFFIRM.

I.

Gribcheck has worked as an electronics technician for the U.S. Postal Service since March 1984. On February 12, 1997, in the process of repairing a machine, Gribcheck moved a portable conveyor table out of its usual position. Another postal employee, Tracy Williams, had been instructed to use the machine, which she did not know was broken, and she moved the conveyor table back to its usual position. According to a statement written by Williams soon after the incident, Gribcheck began "yelling and cursing" and "was grabbing the portable conveyor table, swinging it back around with force, causing me to jump out of the way." The supervisor who had told Williams to use the machine in question, Jean Gist, approached the scene and stated that she "observed . . . Gribcheck swinging the portable conveyor belt and yelling 'the machine is broke.'" Gist stated that when she told Gribcheck that he was behaving inappropriately, "[h]e just kept yelling 'the machine is broke' and waving his arms in the air, refusing to acknowledge me." Gist then reported the incident to other supervisors, including Maintenance Supervisor Sam Brucchieri.

Because Gribcheck and Williams gave differing versions of the event, no disciplinary action was immediately taken against

Gribcheck. On the following Monday, however, three supervisors - Charles Kirkman, Robert Czech, and Brucchieri - determined that Gribcheck should be fired, and on March 26, they issued him a Notice of Proposed Removal. Gribcheck filed a grievance with the American Postal Workers Union AFL-CIO, and his termination was reduced to a fourteen-day suspension. The suspension was upheld in arbitration.

On October 2, Gribcheck sued under the Rehabilitation Act, 29 U.S.C. § 794, seeking compensation for the suspension, which he alleges was in retaliation for a 1995 Rehabilitation Act lawsuit he filed against the Postal Service, which was ongoing at the time of the incident with Williams. The supervisors contend that the suspension was based on the incident with Williams as well as Gribcheck's history of violence in the workplace.

On December 3, 1998, the Postal Service filed a motion for summary judgment, which the district court granted on January 28, 2000. Gribcheck appeals that decision.

II.

We review de novo a district court's grant of summary judgment. *See Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000). Summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Inferences drawn from the underlying facts "must be viewed in the light most favorable to the party opposing the motion" for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

While we have never explicitly stated our framework for reviewing retaliation claims under the Rehabilitation Act, our prior analysis of both retaliatory claims and Rehabilitation Act claims points us to the familiar *McDonnell Douglas* framework used by other circuits in such cases. *See Sherman v. Runyon*, 235 F.3d 406 (8th Cir. 2000) (applying *McDonnell Douglas* test to retaliation claim under the Rehabilitation Act); *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987) (applying *McDonnell Douglas* to

Title VII retaliation claim). *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), establish a three-step burden-shifting framework for analyzing claims of employment discrimination. First, a plaintiff must set forth a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its actions. *Id.* If the defendant carries this burden, the plaintiff must then prove by a preponderance of the evidence that the reasons offered by the employer were a pretext for discrimination. *See Burdine*, 450 U.S. at 253. The ultimate burden of persuasion remains at all times with the plaintiff. *See id.*

A prima facie case of retaliation has four elements: 1) the plaintiff engaged in legally protected activity; 2) the defendant knew about the plaintiff's exercise of this right; 3) the defendant then took an employment action adverse to the plaintiff; and 4) the protected activity and the adverse employment action are causally connected. *See Wrenn*, 808 at 500. In the present case, Gribcheck set forth his prima facie case as follows: 1) his earlier discrimination claim under the Rehabilitation Act was a protected activity; 2) the supervisors who suspended him were aware of his claim; 3) he was then suspended for fourteen days; and 4) the events were causally connected because the suspension occurred while his Rehabilitation Act suit was pending and because the supervisors who suspended him did not witness the encounter with Williams and therefore had no basis for the suspension.

Although the district court concluded that Gribcheck did not establish a prima facie case of discrimination, we conclude that he did clear this low hurdle. *See Wrenn*, 808 F.2d at 500 (citing *Burdine*, 450 U.S. at 253). Gribcheck easily establishes the first and third elements in that he filed a discrimination claim, which is a protected activity, and later was suspended for fourteen days. As for the second element, although the supervisors denied knowing about Gribcheck's prior suit, Gribcheck asserts that he deposed Brucchieri and Kirkman in his earlier discrimination action. Taking the underlying facts in the light most favorable to

Gribcheck, the supervisors most likely knew of his protected activity.

The district court determined that Gribcheck failed to establish the fourth element of his prima facie case, the causal connection between the protected activity and the adverse employment action. The district court concluded:

> Ms. Williams had not met Mr. Gribcheck prior to the incident, and she was not ordered to make a statement about the event. She thus had no motive to lie or to fabricate a tale. Although Mr. Gribcheck's supervisors did not witness the incident, Ms. Williams's supervisor did, and she corroborates Ms. Williams's version. Both women agree Mr. Gribcheck was shouting "the machine is broke," pushed a table toward Ms. Williams, and remained agitated even after the supervisor arrived. Finally, the mere fact that Mr. Gribcheck was suspended during the course of the underlying litigation does not show a causal link between it and the suspension. The suspension occurred while his discrimination case was pending, but so did his violent actions toward a fellow employee.

While the testimony of Williams and her supervisor do support one another and Gribcheck did act violently, the district court jumped ahead in the *McDonnell Douglas* framework by giving weight to these factors at this point in its analysis. The factors cited by the district court do not go to the question of causal connection; they go to the defendant's "legitimate, nondiscriminatory reason" for suspending Gribcheck. Furthermore, the district court should not have determined Williams's credibility on summary judgment. *See Ahlers v. Schebil*, 188 F.3d 365, 369 (6th Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) ("Credibility judgments and weighing of the evidence are prohibited during the consideration of a motion for summary judgment; rather, the evidence should be viewed in the light most favorable to the non-moving party."). A plaintiff may demonstrate the causal

connection by the proximity of the adverse employment action to the protected activity. *See Wrenn*, 808 F.2d at 501. Gribcheck showed that his litigation was ongoing at the time of his suspension, thereby establishing the fourth prong of his prima facie case.

Because Gribcheck established a prima facie case of retaliation, the burden shifts to the U.S. Postal Service "to articulate some legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802. The Postal Service claims it suspended Gribcheck because of his actions in the incident involving Williams. In its Notice of Proposed Removal, the Postal Service charged Gribcheck with four violations of Postal Service policy: "1) conduct unbecoming a postal employee, 2) disrespect and discourtesy to another postal employee, 3) failure to observe safety rules and regulations, and 4) unsafe act." The Notice of Proposed Removal elaborated on the reasons for Gribcheck's discipline:

> [Y]ou caused a disruption on the workroom floor by yelling and using profane language in comments directed at Ms. Williams. You were also observed . . . swinging the portable conveyor table around in a careless and unsafe manner and endangering the safety of others in your area. . . . [O]n the workroom floor on the day in question, there was no yellow barrier tape roping off [the machine to be repaired]. You are aware, as are all of our Electronic Technicians, that you must use the yellow barrier tape to rope off a machine when it is being repaired. . . . Had you used the yellow barrier tape, this incident could have been avoided. In addition, you are aware that carelessly swinging around a large piece of equipment, like the portable conveyor table is very dangerous and could cause injury to yourself and others. You failed in these most basic responsibilities of your position.

The Notice also cited language from Postal Service policies supporting Gribcheck's removal. For example, the Cleveland Performance Cluster Violence in the Workplace Policy provides for "zero tolerance" of violence in the workplace, including vulgar language. Also, the Employee and Labor Relations Manual states that "[e]mployees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service," and that "all employees must be convinced that they are responsible for working safely." The Postal Service also considered Gribcheck's past record in that on April 11, 1995, he received a fourteen-day suspension for "conduct unbecoming a postal employee/threatening a postal employee/failure to keep mentally and physically fit for duty." The U.S. Postal Service met its burden by articulating these legitimate, nondiscriminatory reasons.

After the defendant articulates its nondiscriminatory reasons for taking the employment action against the plaintiff, the presumption of discrimination created by the prima facie case drops out of the analysis. *See Wrenn*, 808 F.2d at 501. "Even though the burden of going forward with evidence to answer [the] prima facie case . . . moved to the [defendant], the ultimate burden of persuasion never shifted from the plaintiff." *Id.* Therefore, the plaintiff must answer the defendant's nondiscriminatory reasons by demonstrating that a reasonable jury could find by a preponderance of the evidence that the defendant's stated reasons are pretextual. *See id.* Gribcheck fails this last step of the *McDonnell Douglas* framework. He does not present any evidence to refute the Postal Service's stated reasons for his suspension; he merely denies their allegations. "Disputation of the facts underlying [the defendant's] legitimate business reason . . . is not sufficient to carry [the plaintiff's] burden." *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987). A "blanket denial [of] the employer's articulated reasons . . . is not enough; a plaintiff must take the extra step of presenting evidence to show that the reasons given are an attempt to cover up the employer's alleged real discriminatory motive." *Id.*

Gribcheck attempts to refute the Postal Service's stated reasons by struggling to point out inconsistencies in the various statements given by Postal Service employees. For example, Gribcheck argues:

> Williams says she was approached from behind by . . . Gribcheck and was startled by his loud protesting to her . . . while she was placing mail in a conveyor table . . . . Williams said that Gribcheck swung a conveyor table in front of her making her jump out of the way in the same incident. Yet this scenario is a physical impossibility. Appellant could not have been in front of and behind Williams at the same time.

This is not evidence, nor does it even cast doubt on Williams's story, as had she simply turned around after she heard Gribcheck, he would have then been in front of her. Similarly, Gribcheck argues:

> Williams testified that Supervisor . . . Gist *asked her what happened* after the incident . . . occurred, *changed her story* to say she saw the incident, but also admitted that she was 'behind the machine' where Williams and Plaintiff were allegedly having a confrontation . . . and that Williams 'was in front of the machine.' Accordingly, Supervisor Gist did not see the Plaintiff assault or threaten or act hostile towards Williams as she claimed in her declarations because that too was a physical impossibility as further evidenced by the fact that she had to ask Williams for information about 'what happened.'

Gribcheck seems to argue that because Gist asked Williams what had happened, she could not have seen the incident for herself. However, Gist's asking Williams what had happened is not inconsistent with Gist's having seen the event for herself. Furthermore, Williams's deposition testimony cited by Gribcheck does not in any way demonstrate that Gist ever changed her story.

Gribcheck's other arguments likewise fail. Gribcheck asserts that "Brucchieri is a bald faced liar," and questions the credibility of Kirkman. This is not the sort of "evidence" contemplated by the third step of *McDonnell Douglas*. *See Irvin*, 837 F.2d at 726. Gribcheck also states that a fellow Postal Service employee testified in a deposition that pushing the table at issue is impossible without dropping to one's knees and shoving it. Unfortunately, Gribcheck did not include this deposition in his filings on appeal, nor did he include the section from Williams's deposition where she allegedly stated that she "could not see clearly behind a machine that blocked her view of Plaintiff."

Even taking all of Gribcheck's assertions in the light most favorable to him, he still cannot show that a reasonable jury could find by a preponderance of the evidence that the Postal Service's stated reasons for his suspension are pretextual. The burden of proof lies with Gribcheck, and he has failed to meet its requirements.

III.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment to the U.S. Postal Service.

Footnotes

[1] In that suit, Gribcheck alleged that he was disabled because of a bipolar disorder and that the Postal Service did not adequately protect him from hostile and prejudiced co-workers. The district court granted summary judgment to the Postal Service. We affirmed in an unpublished decision. *See Gribcheck v. United States Postal Service*, 181 F.3d 101 (6th Cir. 1999).

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JERRY GRIBCHECK,	}	JUDGE LESLEY WELLS
	}	
Plaintiff,	}	CASE NO. 1: 97 CV 2547
	}	
	}	
-vs-	}	Date: January 28, 2000
	}	
MARVIN T. RUNYON,	}	MEMORANDUM
POSTMASTER GENERAL,	}	OPINION AND ORDER
UNITED STATES POSTAL	}	GRANTING
SERVICE,	}	DEFENDANT'S MOTION
Defendant.	}	FOR SUMMARY
	}	JUDGMENT

On 2 October 1997, plaintiff Jerry Gribcheck filed a complaint in this Court, alleging the defendant had retaliated against him in violation of 42 U.S.C. § 12203. Specifically, he contends he was suspended from work for fourteen days because he had filed a complaint alleging violations of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Rehabilitation Act.[1] (Cplt. I[3-4.) He contends further that "[t]his incident of intentional misconduct is part of a continuing pattern of discrimination and retaliation against [him] over the course of the last twelve calendar months, including assaults and battery by supervisors, attempts to tempt [him] into verbal and physical altercations so as to acquire just cause for removal from employment, and all because of [his] opposing an unlawful or perceived unlawful condition of employment at the USPS, and for engaging in prior EEOC activity." (Cplt. Par. 5.)

This case is now before the Court on the defendant's motion for summary judgment. Mr. Gribcheck filed a

memorandum in response. For the reasons that follow, the defendant's motion is granted.

I. Background and Procedural History

Mr. Gribcheck has been employed by the United States Postal Service ("U.S.P.S.") since March of 1984 as an electronics technician in the Cleveland Processing and Distribution Center. (Mtn. for Summ. J. at 2.) On 26 March 1997, the U.S.P.S. sent Mr. Gribcheck a Notice of Proposed Removal, stating his employment was about to be terminated because of an incident that had occurred on 12 February 1997. On the day in question, Mr. Gribcheck was repairing Optical Code Reader ("OCR") number 4 at the Cleveland Center. In order to gain access to the machine, he moved a portable conveyor table out of its normal position. (Def's Ex. A., Arb. Decision at 3-4.). Ms. Tracey Williams, who had been told to begin working on OCR #4 and who did not know of Mr. Gribcheck's presence, noticed the table was out of alignment and moved it back into position. According to Mr. Gribcheck, he was irritated by her action and told her so, but he neither yelled nor acted violently. (Defs Ex. A., Arb. Decision at 4.)

According to Ms. Williams's statement, she began to move away, but "was surprised from behind by [Mr. Gribcheck] yelling and cussing.... At the same time, still yelling and cussing, he was grabbing the portable conveyor table, swinging it back around with force, causing me to jump out of the way. He was still yelling." (Def's Ex. A, Arb. Decision at 3; Williams Dep. at 9-10.) A supervisor also witnessed part of the event, stating that she "observed Technician Jerry Gribcheck swinging the portable conveyor belt and yelling 'the machine is broke.' . . . When she tried to calm him down and speak to him, [he] ignored her, continuing to wave his arms and loudly telling her that the machine was not ready to operate." (Def's Ex. A, Arb. Decision at 3.) Because Mr. Gribcheck's version of events differed from Ms. Williams's version, the Manager of Maintenance Operations initially decided not to take action against Mr. Gribcheck. (Def's Ex. A, Arb. Decision at 5.).

On the Monday following the incident, however, several different managers met and determined Mr. Gribcheck's employment should be terminated.[2] They then sent out a Notice of Removal. (Def s Ex. A, Arb. Decision at 5; Mtn. For Summ. J. at 3.)

In response, Mr. Gribcheck filed a grievance with the American Postal Union AFL-CIO. The U.S.P.S. thereupon withdrew the Notice and instead suspended him from work for fourteen days. That suspension was later upheld following an arbitration. (Def's Ex. A, Arb. Decision at 26.) Mr. Gribcheck claims his fourteen-day suspension was the result of his having filed a 1995 discrimination action in this Court.

The managers responsible for both the Notice of Removal and the suspension testified that they based their decision in part on the 12 February 1997 incident and in part on Mr. Gribcheck's past history of violent actions. (Defs Ex. A, Arb. Decision at 5; Def's Ex. C; Def's Ex. D at 8.) On 8 April 1995, Mr. Gribcheck had an altercation with a fellow employee and stated, "I will kill his fuckin' ass.... If he wants to fight, I will kill him." (Plaintiff's Ex. 2 at 11-12.) On another occasion, he "pulled out of the parking lot, and ... pulled a gun out, waving it at his fellow employees." (Plaintiff's Ex. 2 at 33.) On 12 January 1997, a supervisor apparently slapped him in the head. (Gribcheck Dep. at 25-26.) On several occasions, according to his maintenance supervisor, Mr. Gribcheck "would fly off at times and start throwing tools. When things don't go Jerry's way or he can't fix a piece of equipment, Jerry gets rather upset, fidgety, and just - when I was there once he threw two ink bottles at his tool box [from three to four feet away].... He threw a wrench right at the lid." (Brucchieri Dep. at 17-18.).

II. Law and Analysis

A. Summary Judgment Standard

Summary judgment is appropriate if the evidence in the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law. Fed. R. Civ. P. 56(c). The Supreme Court has further explained:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Where the nonmoving party bears the burden of proof in the case, the initial burden on the moving party under Rule 56 "may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case." Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1087 (6th Cir. 1996).

"When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The "mere existence of a scintilla of evidence in support of the [nonmovant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), but "conclusory allegations standing alone will not defeat a properly supported

motion for summary judgment." White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995).

B. Retaliation

Retaliation claims are subject to the familiar tripartite structure of proof first set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973). The plaintiff must first prove his prima facie case, one that shows (1) he engaged in a protected activity; (2) this exercise of his protected civil rights was known to the defendant; (3) he suffered adverse employment action; and (4) a causal connection existed between the protected activity and the adverse action. Canitia v. Yellow Freight Sys., Inc., 903 F.2d 1064, 1066 (6th Cir. 1990). A causal connection can be established through either direct evidence or "knowledge coupled with closeness in time that creates an inference of causation." Wrenn v. Gould, 808 F.2d 493, 501 (6th Cir. 1987). If the plaintiff succeeds, the burden shifts to the defendant to set forth a legitimate, non-discriminatory reason for the adverse action. If the defendant meets his burden of production, the plaintiff must then prove the defendant's proffered reason for his action was merely a pretext for discrimination. See Penney v. United Parcel Svcs., 128 F.3d 408, 417 (6th Cir. 1997). The plaintiff "bears the burden of persuasion throughout the entire process." See Canitia, 903 F.2d at 1066. Although Mr. Gribcheck has established the first three elements of prima facie case, he cannot establish the requisite causal connection. He contends there is a "basis for inferring a connection between the discipline issued to Plaintiff and a retaliatory motive" because his suspension occurred during the underlying litigation in this Court and because those responsible for that suspension did not actually witness the incident and thus could not know whether it was true or false. (Br. in Opp'n at 4.) However, Ms. Williams had not met Mr. Gribcheck prior to the incident, and she was not ordered to make a statement about the event. She thus had no motive to lie or fabricate a tale.

Although Mr. Gribcheck's supervisors did not witness the incident, Ms. Williams's supervisor did, and she corroborates Ms. Williams's version. Both women agree Mr. Gribcheck was shouting "the machine is broke," pushed a table toward Ms. Williams, and remained agitated even after the supervisor arrived. (Def's Ex. B, Def's Ex. E; Def's Ex. A, Arb. Decision at 3.) Finally, the mere fact that Mr. Gribcheck was suspended during the course of the underlying litigation does not show a causal link between it and the suspension. The suspension occurred while his discrimination case was pending, but so did his violent actions toward a fellow employee. Even if he could establish his prima facie case, moreover, Mr. Gribcheck cannot prove the U.S.P.S.'s actions were pretext. He claims it is "clear that the 'proffered reasons' given by the U.S.P.S. did not actually motivate the adverse action complained of by Plaintiff in the Complaint ..... (Br. in Opp'n at 4.) The Postal Service has, however, a policy of "zero tolerance" toward violence in the workplace. Specifically, it has a written policy against "[a]ny type of vulgar language, racial slurs, baiting, goading, incisive remarks, gestures, sexual harassment, or any other types of personal behavior which would lead to a hostile workplace." (Def's Ex. A, Notice of Removal at 3.) The Employee and Labor Relations Manual also states clearly that "[e]mployees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service." (Def's Ex. A, Notice of Removal at 3.) Mr. Gribcheck's violent and abusive behavior is distinctly at odds with the U.S.P.S.'s policy. Moreover, beyond his blanket denial that the 12 February 1997 incident occurred Mr. Gribcheck has put forth no evidence to counter the U.S.P.S.'s claim that it suspended Mr. Gribcheck because of that behavior -- despite the fact that the burden of persuasion remains at all times with him. See, Canitia, 903 F.2d at 1066. For the foregoing reasons, the defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/

Lesley Wells

UNITED STATES DISTRICT JUDGE

Footnotes

[1] See Gribcheck v. Runyon, Case No. 1: 95 CV 2502 (N.D. Ohio 1997). In that case, Mr. Gribcheck contended he was disabled because he suffered from a bipolar disorder which made him poorly equipped to function adequately in any work environment where he must deal with frequent bantering by co-workers or must cope with insensitive supervision. (Order at 3.) Mr. Gribcheck contended the U.S.P.S. did not protect him from hostile and prejudiced co-workers. This Court granted summary judgment in favor of the defendant.

[2] The three managers responsible for Mr. Gribcheck's proposed termination and ultimate suspension were Charles Kirkman, Robert Czech, and Samuel Brucchieri.

[3] Mr. Gribcheck engaged in a protected activity when he filed charges with the EEOC; it appears Messrs. Kirkman, Czech, and Brucchieri were aware of Mr. Gribcheck's complaints to the EEOC and his litigation in this Court; and he suffered an adverse employment action when he was suspended for fourteen days.

APPENDIX "C"

29 USC Section 794 relating to Nondiscrimination under Federal grants and programs

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(a) Promulgation of rules and regulations:

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined:

For the purposes of this section, the term "program or activity" means all of the operations of -

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers:

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section:

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

APPENDIX "D"

Federal Rule of Civil Procedure 56 relating to Summary Judgment Motions

---

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is

necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX "E"

Argument from Appellant's Sixth Circuit Brief offered pursuant to Supreme Court Rule 14.1 (k) (v) "other appended materials"

In defense to the allegations made in the Complaint, the District Court gave credence to the uncorroborated prior testimony of Plaintiff-Appellant's supervisor Sam BRUCCHIERI who accused Plaintiff of violence at the workplace on a prior occasion in a deposition which was used currently to rebut the claim that Defendant was not aware of the Plaintiff's prior EEOC activity. (Mem. Op. And Order, page 4, R. 27. 4, JA 11). For example, the Defendant-Appellee argued on Motion that "(f)irst, Gribcheck cannot show that the officials who caused his discipline for the behavior that he displayed on February 12, 1997 were sufficiently aware of his previous EEO activity to be charged with knowledge." (Def. Mot. S/J at 6, R. 21, JA 55). In response, Appellant argued (Brf. in Opp. S/J at 2; JA 151):

"REPLY: This claim is false. USPS agent Brucchieri claimed, according to the Defendant that "he had no idea what type of lawsuits Gribcheck files since Gribcheck filed so many things." (Motion S/J at 6). "He further testified that he did not get involved in EEO matters and that he really did not know what these cases were all about." (Motion S/J at 6). Brucchieri is a bald faced liar. Brucchieri was an adverse witness for Gribcheck in Case No. 1: 96 CV 0012, *Gribcheck v. Marvin T. Runyon* which was filed in this same Court with this same judge and he was accused of discrimination by the Plaintiff after the filing of an EEOC charge against the USPS in 1995. A copy of his deposition from that case is attached as Exhibit 2. *See, also,* Exhibit 4 which shows Brucchieri was a witness in a prior Title VII case had with the Plaintiff in this Court."

Moreover, in its Motion for Summary Judgment, Defendant-Appellee further claimed that USPS Manager KIRKMAN, the USPS officer who acted adversely against the

Plaintiff, was not aware of the EEOC proceedings in this case and in prior cases and thus could not have been motivated to act against the Plaintiff-Appellant out of retaliation. Yet KIRKMAN was a witness in Case No. 1: 96 CV 0012, *Gribcheck v. Marvin T. Runyon* as was Bruchierri and moreover, signed as a USPS Representative on an EEOC settlement agreement (Brf. In Opp. S/J Exhibit 4, JA 152-153) with the Plaintiff entered 1-19-97, and immediately prior to the events in question taking place.

The remainder of the Defendant's defenses addressed the claims made by USPS worker Tracy WILLIAMS regarding the Plaintiff-Appellant's conduct on 8 APRIL 97. On the relevant date, WILLIAMS says she was approached from behind by Plaintiff-Appellant Gribcheck and was startled by his loud protesting to her that she was misusing a piece of mail sorting equipment, and while she was placing mail in a conveyor table at the USPS Oranage Avenue facility in Cleveland, Ohio. (WILLIAMS DEPO at 9-10, JA 106-107). WILLIAMS said that GRIBCHECK swung a conveyor table in front of her making her jump out of the way in the same incident. (WILLIAMS DEPO at 25-26; 30). Yet this scenario is a physical impossibility. Appellant could not have been in front of and behind WILLIAMS at the same time. The District Court has ignored this fact in making its ruling granting Defendant's Motion for Summary Judgment.

Moreover, WILLIAMS testified that Supervisor Gene GIST asked her what happened after the incident in issue occurred, changed her story to say she saw the incident, but also admitted that she was "behind the machine" where WILLIAMS and Plaintiff were allegedly having a confrontation when it occurred, and that WILLIAMS "was in front of the machine." (WILLIAMS Depo at 10, JA 107). Accordingly, Supervisor GIST did not see the Plaintiff assault or threaten or act hostile towards WILLIAMS as she claimed in her declarations because that too was a physical impossibility as further evidenced by the fact that she had to ask WILLIAMS for information about "what happened." (Defendant's Exhibit "E", JA 143). The District Court has ignored this fact in making its ruling granting

Defendant's Motion for Summary Judgment. Moreover, WILLIAMS testified that she could not see clearly behind a machine that blocked her view of the Plaintiff. (WILLIAMS Depo at 18). Yet in spite of this, the District Court opined that "Although Mr. Gribcheck's supervisors did not witness the incident, Ms. Williams's supervisor did, and she corroborate Ms. Williams's version. Both women agree Mr. Gribcheck was shouting the "machine is broke", pushed a table towards Ms. Williams, and remained agitated even after the supervisor arrived." (Mem. Op. And Order, page 7, R. 27. 7, JA 12).

This finding is a curious one, for the deposition record shows as noted, WILLIAM"s supervisors inlcuding GIST, KIRKMAN, CZECK and BRUCCHERI saw nothing of the Plaintiff or the incident in issue. Moreover, as to the ability of Appellant to "swing" a conveyor table at WILLIAMS as claimed by GIST in her affidavit (Def. Ex. "E", JA 143); fellow USPS worker Fred Thomas testified that that was not possible without dropping to one's knee and shoving the same and by "putting your back into it" due to the weight of the item. (THOMAS Depo at 8-11). No such conduct has been attributed to the Plaintiff by the Defendant's agents as would be expected if they were telling the truth.

In the summary judgment proceedings below, the Defendant then goes on to claim that Plaintiff "cannot demonstrate that the discipline issued to him on March 26, 1997 (by KIRKMAN) is causally related to his prior protected activity." (Motion S/J at 7, JA 56). Defendant relies on the testimony of supervisor KIRKMAN who has as demonstrated *supra* no credibility. (Motion S/J at 8; Exhibit 4, JA 57). Moreover, KIRKMAN's version of events about what happened on the dates in question between Plaintiff and WILLIAMS where he claims that he knew WILLIAMS was struck by the Plaintiff contradicts WILLIAM's story where she denied this happened. (KIRKMAN Depo at 6). KIRKMAN then goes on to claim that he did not know if WILLIAM's story was true or false but administered discipline against the Plaintiff anyway. (KIRKMAN Depo at 7-8). Accordingly, the District Court's

claim that there is no basis for inferring a connection between the discipline issued to Plaintiff and a retaliatory motive by KIRKMAN and BRUCHERI, USPS agents for prior EEOC activity is baseless. (Mem. Op. And Order at 6; 7, R. 27; JA 13-14). The record shows KIRKMAN admits he disciplined Plaintiff-Appellant for conduct he does not know took place, after contradicting WILLIAMS version of events as justification for his treatment of Plaintiff, and after lying about his prior EEOC activity involvement with the Plaintiff, and all taking place without any credible explanation offered as a justification for the same.

Moreover, the Court's claim that WILLIAMS is credible because she had no motive to lie is not a dispositive issue. (Mem. Op. And Order at 6; R. 27, JA 13). Plaintiff never alleged that WILLIAMS or GIST retaliated against the Plaintiff, but BRUCHIERRI and KIRKMAN certainty did. And aside from the fact that the credibility of WILLIAMS story is for the jury to decide, here the record shows USPS management used WILLIAMS unprovable claims as an excuse for imposing discipline on the Plaintiff-Appellant. A reasonable juror could infer as much and the District Court had no right under *Diebold* to make an inference that WILLIAMS and the USPS management's testimony was credible. Moreover, after advising in its memorandum opinion and decision that the Appellant could only prove "the first three elements of his *prima facie* case" (Mem. Op. And Order at 6; R. 27, JA 13) the Court then argued that "even if he could establish his *prima facie* case...he cannot prove the USPS's actions were (a) pretext." (Mem. Op. And Order at 7; R. 27, JA 14).

The District Court supported its findings by stating the USPS has a zero tolerance of violence in the workplace policy, claims without explaining how Plaintiff violated that policy that he violated the policy, among others, and that that somehow is proof that retaliation motives did not factor into the adverse discipline of the Plaintiff-Appellant for the WILLIAMS incident. (Mem. Op. And Order at 8; R. 27, JA 15). As noted, the Court's analysis cannot be reconciled with the undisputed facts. As the

District Court dismissed the Plaintiff-Appellant's case without proper justification, the Appellant now seeks a reversal of the erroneous decision and a remand of this matter to the District Court for trial by jury.